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Limits of Interpretivism

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LIMITS OF INTERPRETIVISM

RICHARD PRIMUS*

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INTRODUCTION

Justice Stephen Markman sits on the Supreme Court of my home state of Michigan. In that capacity, he says, he is involved in a struggle between two kinds of judging. On one side are judges like him. They follow the rules. On the other side are unconstrained judges who decide cases on the basis of what they think the law ought to be.¹ This picture is relatively simple, and Justice Markman apparently approves of its simplicity.² But matters may in fact be a good deal more complex.³

* Professor of Law, The University of Michigan. Thanks to Alex Christopher and Tina Sessions. I also thank the leadership of the University of Michigan chapter of The Federalist Society. In addition to organizing this Symposium, they have been generally terrific interlocutors on matters of constitutional law.

1. See Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149, 154 (2009).

2. See Stephen J. Markman, *A Response to Professor Primus*, 32 HARV. J.L. & PUB. POL'Y 179, 180 (2009).

3. The same is true of Justice Markman's contention that the judges on his side of this divide are at a disadvantage in the court of public opinion. According to Justice Markman, the public learns about judicial decisions through the media, and the media tend to describe the outcomes of cases without explaining the reasoning, so when the text of the law requires an unpopular result, the textualist judge will be blamed for making an unpopular decision rather than appreciated for following the rules. See Markman, *supra* note 1, at 155–57. The intuition behind Justice Markman's concern is easy to follow, but it needs to be considered critically. For one thing, it is not clear that judges who keep strictly to the text of en-

Justice Markman describes his own jurisprudence as textualist, originalist, interpretivist, and traditional.⁴ To his credit, he does not insist on any of those labels as if the name were the most important thing. But he does profess to follow the texts of statutes and constitutions, to honor original meanings, to interpret the law rather than make it up, and generally to respect the traditions of American law and the traditional role of the judge. These are substantive claims, not just claims about labels. One problem with this set of claims, though, is that they often come into conflict with one another. Textualism, originalism, and traditional judging are not just different names for the same thing. They are different jurisprudential approaches, with different strengths and weaknesses. Often, a judge must choose among them. In what follows, I will show that one cannot be a rule-following judge simply by being a textualist and an originalist and a traditionalist, because those approaches to judging often point in different directions.

So if Justice Markman is not all of those things at once, he may be less of each of them than he imagines. Though he considers himself an originalist, it may be the case that he is not really looking for original meanings quite as much as he asserts. Though he considers himself a textualist, it may be the case that his judging is less a product of enacted legal texts than one might think.

acted law are the ones most likely to reach unpopular results—or if they are, something might be badly wrong with the premise that enacted law reflects the preferences of the public. Moreover, one paradigmatic foil for the textualist judge is the activist judge who foists his own values on an unwilling citizenry, and there is good reason to expect that activist judge to face a great deal of public criticism: By hypothesis, that judge imposes unpopular results. That said, these thoughts about which kinds of judges are the targets of the most criticism are speculative, and speculation is not a good way to settle an empirical question. An answer to the question of which judges face the most public criticism should come from data, and Justice Markman offers no data to support the claim that he and his methodological kind are the ones who suffer most.

I would not be surprised to learn that each judge believes that *his* kind of judge takes more incoming fire than other kinds of judges do. Judges are people, after all, and like other people they exhibit salience biases. Criticism of *me* is always more memorable—to me—than criticism of the other guy. And criticism of me is also more likely to be *unjustified*—in my view—than criticism of the other guy. It would be natural, therefore, for judges of each methodological school to think themselves subject to more criticism than other kinds of judges are.

4. See *id.* at 151.

It does not follow, of course, that Justice Markman is simply making things up, unconstrained by law. One would make that leap only if one believed that there are two choices in judging: either one is a textualist-originalist-interpretivist-traditional-rule-oriented judge, or else one is a renegade. But those are not the only choices.

I. INTERPRETIVISM AND TEXTUALISM

Of the terms that Justice Markman uses to describe his jurisprudential theory, the two that are most compatible with each other are “interpretivist” and “textualist.” These terms both name the idea that judges should decide constitutional and statutory cases by interpreting the words of the applicable constitutions and statutes. The difference between the terms is partly a matter of history and partly a matter of rhetoric.

To oversimplify the history of constitutional discourse only slightly, “interpretivism” is what textualism was called between 1975 and 1984. Before then, the term “interpretivism” was not in use. In his 1975 article *Do We Have an Unwritten Constitution?*, Thomas Grey called the model of judging on which judges confine themselves to reading and interpreting the words of the written constitutional text “interpretive.”⁵ Five years later, in his book *Democracy and Distrust*, John Hart Ely adopted Grey’s term. In Ely’s canonical formulation, “interpretivism” is the view “that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”⁶ Interpretivism is not shallow literalism: the interpretivist knows that judges must often *interpret* the written text rather than always being able to apply it mechanically. But the thing to be interpreted—the source of law—is the words of the text. Grey’s article made a splash, and Ely’s book dominated the field, so people remembered the term.

The trouble with this nomenclature, though, was that the word *interpretivism* does not name the distinctive commitment of the idea that it denoted. Nearly everyone thinks that judges

5. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

6. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

are supposed to *interpret* the law. The question is whether the law that judges interpret is wholly contained in the *text* as opposed to residing in some combination of sources among which text might be one. Common-law judging is not about interpreting the words of texts, but it is very much about interpreting the law. Even avowedly anti-positivist Dworkinians are engaged in interpreting the law, rather than making up what the law should be as if from whole cloth. They have a different view from most textualists about the set of factors that determine what the law is. According to the Dworkinians, that set of factors can include norms and morals. But the Dworkinians regard the norms and morals that are among the determinants of law as being within the law as it is, not as factors external to the law.⁷ When they reason about principles of justice, therefore, Dworkinians are interpreting the law as they understand law.

In 1984, after due reflection, Grey confessed that “interpretivist” and “noninterpretivist” were not good names for the debate he had characterized with those labels. “We are all interpretivists,” he wrote, and rightly so. “[T]he real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.”⁸ To replace “interpretivist,” therefore, Grey adopted the term “textualist,” on the reasonable basis that the role of the written text is the crux of the relevant disagreement.⁹ Constitutional discourse has generally followed this substitution of terms. We now speak of textualism, and the term “interpretivism” is rare, except as a throwback to the 1970s.¹⁰

One possibility is that when Justice Markman describes himself as an “interpretivist” as well as a “textualist,” he means to be comprehensive, or to indicate that it does not matter which of these terms is used to identify his approach. In the remain-

7. See Christopher L. Eisgruber, *Should Constitutional Judges be Philosophers?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 5, 5 (Scott Hershovitz ed., 2006).

8. Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 1 (1984).

9. See *id.*; see also Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 743 (1982) (making an even stronger suggestion shortly before, writing that the theory known as “interpretivism” should actually be called “textual determinism”).

10. A Westlaw search for the terms “interpretivist” and “textualist” in law review articles published since 2000 found more than eight times as many documents using the latter term as using the former.

der of this Essay, I will generally proceed on that assumption. But there is also another possibility of which we should be aware. Instead of understanding “interpretivist” and “textualist” as two terms that have carried the same meaning at different points in history, we can understand them as terms with different rhetorical implications.

If I call myself a textualist in the course of explaining how my jurisprudence differs from that of my colleagues, it is pretty clear that I mean to say that I value the text differently—indeed, more—than they do. If I call myself an *interpretivist* in the course of such an argument, the implication is that I place a higher value on *interpretation*. That implication is precisely why Grey repented his use of “interpretivist.”¹¹ To imply that the people on the other side are not interpreting is by and large misleading. They, too, are interpreting, but they have a different understanding of the sources of law that are to be interpreted. As a matter of rhetoric, however, I can score points by implying that what my rivals are doing is something other than interpreting the law. If a judge is not interpreting the law when he decides a case, the audience’s intuition will run, then he is making things up according to his own preferences. The alternative to interpretation in this framing is legislation, or activism, or some other form of unjustified judicial overreaching.

When a judge calls himself an interpretivist in 2009, it is often hard to know whether he means to score these rhetorical points or whether he simply has not kept up with changes in the academic conversation. Perhaps one should give such a judge the benefit of the doubt. That said, Justice Markman’s major substantive claim about his jurisprudence is that he is constrained by rules where other judges simply choose their desired outcomes. The charge that judges choose outcomes rather than following rules is quite close to the charge that those judges are making things up. In other words, the substance of Justice Markman’s complaint about judges who do not share his approach aligns well with the rhetorical point that would be made by implying that those judges do something other than interpret the law.

Almost no judge thinks that his job is to make up whatever he thinks the answer should be, regardless of the law. If nonin-

11. See Grey, *supra* note 8.

terpretivism means freedom from the law, then American law features almost no noninterpretivist judging. But our legal system does involve a good deal of nontextualist judging. Judges regularly decide cases by methods other than reading the words of the relevant constitutional and statutory clauses and figuring out how those words bear on the question presented. Indeed, *all* judges decide many of the cases they see by methods other than reading the words of the relevant clauses.¹² Some judges, however, are reluctant to admit this reality. Perhaps for rhetorical reasons, or perhaps because they have not come to terms with the truth about their own jurisprudence, some judges speak as if their decisionmaking were simply a matter of reading the text even when it is not.

II. TEXTUALISM AND RULES

Textualism promises transparency. The law, says the pure textualist, is the set of words that the lawmaking body adopted. Those words are written in publicly available places. It follows that ordinary citizens can read the law and call officials to account if the officials do not follow the law. In a democratic society that values the rule of law, these are powerful attractions for a legal theory.

Sometimes, though, the impulse to hold officials to the transparent text of the law gives rise to unwarranted criticism. Indeed, Justice Markman's major example of unjustified media criticism aimed at his court is a matter of textualism gone awry. In the relevant case, *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*,¹³ Justice Markman joined the majority of the Supreme Court of Michigan in holding that the plaintiff lacked standing to pursue a claim under the Michigan Environmental Protection Act. The court reached that holding despite a statutory provision stating that, for the relevant kind of environmental-law violation, "any person may maintain an action in the circuit court."¹⁴ Given the apparent conflict be-

12. I do not mean that judges never decide cases by reading the words. I mean only that there is no judge—or at least no judge in the American system—for whom reading the words is the only method of deciding cases.

13. 737 N.W.2d 447, 456 (Mich. 2007).

14. MICH. COMP. LAWS § 324.1701(1) (1995) ("The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged

tween that language and the court's ruling, Justice Markman reports, the court faced a certain amount of derision in the media for "not interpreting 'any person' to mean 'any person.'"¹⁵

I have considerable sympathy for the supreme court at this juncture. If one knows only the language of the statute, the criticism seems valid, and that makes the court look either wanton or foolish. But the statute is not the only relevant source of law. The law also contains constitutional doctrines of standing. If the statute conferring standing on "any person" exceeded the constitutional limits of standing, then the court was right to rule as it did.

Note, however, the terms in which Justice Markman defends his court's decision. Yes, he says, he and his colleagues can read the words "any person" in the statute. But "it was also incumbent on a court of law to read the *constitution* at the same time that it read the *statute*."¹⁶ Justice Markman is here correctly emphasizing that textualism requires acquaintance with more than one document. In addition to the statute, judges must read the relevant constitutional text, which has greater authority. In other words, Justice Markman is saying, he and his colleagues should not be faulted for departing from the text of the law. They should be applauded for following the text of the right law. They read the constitution, and it told them what to do.

But exactly what text did Justice Markman read in this case? The court cited two provisions of the Michigan Constitution, namely Article III, Section 2, and Article VI, Section 1. They are reproduced here in their entirety:

Article III, Section 2: The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise pow-

violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.")

15. Markman, *supra* note 1, at 155–56 (citing Pat Shellenbarger, *Milliken: Water ruling 'major setback': Former governor says decision destroys intention of state's Environmental Protection Act*, GRAND RAPIDS PRESS, Aug. 5, 2007, at A1; Editorial, *Supreme Court turns State Environmental law on its ear*, BAY CITY TIMES, Aug. 26, 2007, at 8A).

16. Markman, *supra* note 1, at 156.

ers properly belonging to another branch except as expressly provided in this constitution.¹⁷

Article VI, Section 1: The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.¹⁸

The word “standing” does not appear in either of these texts. Nor is there any language that creates a doctrine of restricted standing by some other name.

According to the court, the separation of powers and the idea of “the judicial power” inherently require the standing doctrine that the court used to decide the case. “Standing,” the court explained, “is an indispensable doctrine rooted in our constitution and the tripartite system of government it prescribes.”¹⁹ That may be. But a competent speaker of English who did not know the doctrine of standing could read the texts of Article III, Section 2, and Article VI, Section 1, many times and never imagine that they ordained a standing doctrine, much less the particular standing doctrine that decided this case.

Imagine, then, what would happen if the Michigan Supreme Court justices said to their media critics, “Yes, we read the statute. But did you read the constitution? Go read Article III, Section 2, and Article VI, Section 1, and then we’ll talk.” The media critics would go away and read the sections. They would then return and say, quite reasonably, “We read those sections. We read them carefully. There is not a word in them indicating that ‘any person’ cannot sue under the Michigan Environmental Protection Act.”

Perhaps the court was right to deny standing in *Michigan Citizens for Water Conservation*. But the majority justices did not reach their decision by reading the text of Article III or Article VI. Instead, they consulted judicial doctrine, which is to say that they derived the relevant standing requirements largely from what judges have decided through a complex process of

17. MICH. CONST. art III, § 2.

18. MICH. CONST. art VI, § 1.

19. *Mich. Citizens*, 737 N.W.2d at 453.

reason and experience. In supporting its decision, the majority cited and discussed several prior cases setting out the rules of standing. If the majority justices were to say to their media critics, "Look, we know what the statute says, but you also have to read these eleven court cases," then they would have a good point. But then the authority they claimed would not be that of the constitutional text.

I do not insist on too rigid a distinction between what is and what is not "in" a constitutional text. The meaning of language always depends on more circumstances than the arrangement of letters and words. In our legal system, one circumstance that powerfully shapes how people understand the content of constitutional texts is judicial doctrine. If courts in Michigan regularly call standing an Article VI issue, then judges, lawyers, and law professors in Michigan will come to associate the doctrine of standing with Article VI just as surely as if the text of Article VI contained the words "Only persons who can demonstrate individual, quantifiable, and redressable injury have standing to sue." To the extent that a text means what some relevant community of readers sees in it, one might therefore argue that the text of Article VI *does* contain a rule of limited standing—just as, I suppose, the text of the Due Process Clause of the United States Constitution's Fourteenth Amendment²⁰ guarantees a pregnant woman's right to have an abortion. But I doubt that Justice Markman means to embrace this line of reasoning, much less that he means to honor it with the name "textualism."

If textualism has a core, it is the proposition that the text of the law has meaning and authority independent of what the judges have said and done.²¹ On that understanding, it is very hard to see how Justice Markman could have reached his decision in *Michigan Citizens for Water Conservation* simply by reading the text of Michigan's constitution.

20. U.S. CONST. amend. XIV, § 1.

21. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (laying out the contrast between textualist and doctrinalist approaches to constitutional interpretation).

III. TEXTUALISM AND ORIGINALISM

Recall now that Justice Markman describes himself as an originalist as well as a textualist.²² Perhaps these two commitments are parts of a single whole. In other words, perhaps interpreting the text means understanding it according to its original meaning. If the meaning of a text is its original meaning, and if an original meaning has fallen out of common use, then a competent speaker of English today might well fail to grasp a meaning that a text legitimately carries. Therefore, if something in the Michigan Constitution originally carried a meaning about standing, then perhaps we can make sense of Justice Markman's claim that the Michigan Supreme Court reached its decision by reading the constitution. Perhaps "reading the constitution" is shorthand for reading the constitution in light of its original meaning.²³

That resolution would cohere with the argument of the majority in *Michigan Citizens for Water Conservation*, which expressly invoked the authority of originalism. To neglect the principle of standing, the majority wrote, "would imperil the constitutional architecture carefully constructed by its drafters and ratified by the people."²⁴ But on due consideration, the Michigan court's analysis cannot be understood as originalist any more than it can be understood as textualist. Quite simply, the majority in that case did nothing that should count as identifying the original meaning of Michigan's constitutional text.

The court's argument proceeded as follows: The Constitution of Michigan ordains the separation of powers. Michigan's separation of powers is like the separation of powers that exists in the federal government. In the federal context, the separation of powers entails certain requirements about standing to sue. Therefore, the same requirements apply under the Michigan Constitution.²⁵

22. See Markman, *supra* note 1, at 151.

23. Note, however, that this move sacrifices much of the transparency that is part of textualism's appeal. To whatever extent original meanings differ from the meanings that current competent readers of English understand, giving force to original meanings will sanction law that departs from what ordinary citizens might think the plain text requires.

24. *Mich. Citizens*, 737 N.W.2d at 453 (internal quotation marks omitted).

25. *Id.*

To work out what the federal requirements for standing are, the Michigan Supreme Court discussed several cases decided by the United States Supreme Court between 1972 and 2000. The majority opinion drew on *Sierra Club v. Morton*,²⁶ *Warth v. Seldin*,²⁷ *Lujan v. Defenders of Wildlife*,²⁸ and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*²⁹ The Michigan Supreme Court then applied those precedents to the case before them. That is garden-variety judging. But what would it mean to call this process of reasoning *originalist*? In other words, what would a judge have to believe to think that United States Supreme Court cases decided between 1972 and 2000 would reveal the original meaning of the Michigan Constitution of 1963?

Were the Justices of the United States Supreme Court between 1972 and 2000 deeply influenced by the ratification debates surrounding the adoption of the Michigan Constitution of 1963, such that their views of the federal separation of powers are good evidence of ideas prominent in Michigan at the time that the Michigan Constitution was adopted? Alternatively, did the ratifiers of the Michigan Constitution in 1963 understand themselves to be adopting the original understanding of the federal separation of powers, and indeed the *correct* original understanding of the federal separation of powers, rather than the misunderstanding of the federal separation of powers that prevailed in the federal courts in 1963? Was the ratifying public of the State of Michigan in 1963 sufficiently expert in the federal separation of powers to have differentiated between the separation of powers as correctly understood in 1787 and the separation of powers as misunderstood by dominant contemporary professional opinion and then to have chosen the former over the latter? Perhaps less absurdly, might the 1963 Michigan ratifiers have had a general sense about the separation of powers and intended to peg the specifics of the Michigan separation of powers to the developing understanding of the separation of powers among federal judges, then and in the future? Might a reasonable Michigander in 1963 have understood the proposed state constitution in those terms?

26. 405 U.S. 727 (1972).

27. 422 U.S. 490 (1975).

28. 504 U.S. 555 (1992).

29. 528 U.S. 167 (2000).

I do not know what actual Michiganders or hypothetical reasonable Michiganders thought or would have thought about the separation of powers in 1963. Figuring it out would require a historical account. In *Michigan Citizens for Water Conservation*, the Michigan Supreme Court supplied no such historical account. Without such an account, one cannot claim the authority of originalism.

IV. ORIGINALISM AND CONSTRAINT

I do not fault Justice Markman or the Michigan Supreme Court for deciding *Michigan Citizens for Water Conservation* on the basis of judicial doctrine rather than on the basis of original meanings. It is difficult, after all, to figure out what the public of Michigan in 1963 thought about the separation of powers, or, more specifically, what their ideas about the separation of powers would have meant for the question of who can sue under environmental statutes. If the goal is to have a clear rule, it is much easier to follow what judges have said when confronting similar questions in recent cases. And as Justice Markman says, the core of his jurisprudence is the commitment to be governed by rules.

The lesson here is that Justice Markman's desire for a jurisprudence in which judges are constrained by rules is in tension with his characterization of himself as an originalist. The tension is more than incidental. As a general matter, originalism is a poor strategy for establishing clear rules of decision in advance of particular cases.³⁰ Originalist source material is sometimes scarce and sometimes endless. It often does not specifically address the question that must be decided. When it does address that question, it often does so in many different voices, no one of which has a greater claim to authority than the others.³¹ Moreover, judges' understandings of originalist history vary over time. This is not a criticism of judges: Professional historians' understandings of the past are also constantly changing. But if our view of some set of historical materials is never stable,

30. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 510 (1995); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 302 (2005).

31. See, e.g., Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1597-99 (1997).

it is hard to understand why we should expect consulting those materials to be a good way of deriving stable rules.³²

This is not to say that reference to original meaning is never clarifying. In cases that actually arise for judicial decision, however, originalist sources are regularly too open-textured to compel one and only one interpretation of the source of law being considered. Indeed, judges in such cases regularly seem able to support either side of the question with originalist argument. Here is an incomplete list of examples taken just from decisions of the United States Supreme Court during the last few months. In *District of Columbia v. Heller*,³³ the majority and the dissent disagreed about the original meaning of the Second Amendment. In *Giles v. California*,³⁴ the majority and the dissent disagreed about the original meaning of the Sixth Amendment. In *Boumediene v. Bush*,³⁵ the majority and the dissent disagreed about the original meaning of the Suspension Clause. In *Medellin v. Texas*,³⁶ the majority and the dissent disagreed about the original meaning of the Presentment Clause and the Treaty Power. In cases like these, judges invoke original meanings to support the same range of rival outcomes that would otherwise be available.

This does not mean that judges are deliberately manipulating their accounts of original meaning. Each may sincerely believe that original meanings support his or her resolution of the case. Indeed, each judge may authentically believe himself constrained to reach a given result on the basis of original meanings, even if other judges authentically believe themselves constrained to reach the opposite result on the same basis. But in a great many cases, judges seem to conclude that the relevant original meanings support the same results that we suspect they would reach if they had not consulted original meanings. To whatever extent that suspicion is justified, original meanings are not functioning as constraining rules.

Justice Markman's contention is that a judge who pays attention to original meanings will in fact be constrained, and it

32. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1190 (2006).

33. 128 S. Ct. 2783 (2008).

34. 128 S. Ct. 2678 (2008).

35. 128 S. Ct. 2229 (2008).

36. 128 S. Ct. 1346 (2008).

would be fair for him to say that no list of cases in which different judges reached different conclusions based on original meaning can disprove the claim that original meanings do constrain. Such a list could only prove that original meanings do not constrain *perfectly*, and no sensible jurisprudential method can make the result in every case entirely determinate. But supporting the claim that original meanings do constrain would require examples of cases in which attention to original meanings was in fact constraining.³⁷

The only example that Justice Markman offers—*Michigan Citizens for Water Conservation*—was decidedly not such a case, because the Michigan Supreme Court did not reach its result in that case by examining the original meaning of the constitutional provisions at issue. The court did examine a series of judicial precedents, and those precedents announced a particular set of legal principles as the official original meaning of certain constitutional provisions. The operative source of the rules that the Michigan Court applied, however, was those judicial precedents rather than any set of originalist sources. Indeed, one common function of judicial decisionmaking is to take a historical record that is too vague or too complex to serve as the source of a legal rule and stamp it with an official meaning determinate enough to bear clearly on legal issues.

Consider, as an example, the question of whether the Second Amendment guarantees an individual right to own firearms. Before 2008, several courts tried to answer this question on the basis of original meanings. They reached different answers, which is to say that the quest for original meanings was of limited utility in producing a clear, stable rule for judges to follow.³⁸ Then the United States Supreme Court decided *District of Columbia v. Heller*, ruling 5 to 4 that the Second Amendment does confer such a right.³⁹ The *Heller* Court grounded its argument in original meanings. It does not follow, of course, that originalist reasoning supplied a clear rule for the Justices in

37. If Justice Markman can say, "Were I to consider all appropriate reasons and authorities other than original meaning, I would vote to affirm, but when original meaning is added, I must vote to reverse," then he has supported his assertion that original meanings constrain his decisionmaking.

38. See, e.g., *Parker v. District of Columbia*, 478 F.3d 370, 389–90 (D.C. Cir. 2007); *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002); *United States v. Emerson*, 270 F.3d 203, 259–60 (5th Cir. 2001).

39. 128 S. Ct. 2783, 2821 (2008).

that case. After all, five Justices believed that original meaning pointed one way, and four Justices believed that it pointed the other way. In the future, however, courts deciding cases raising the question of whether the Second Amendment guarantees an individual right to own firearms will enjoy the benefit of a clear rule.⁴⁰ When they act on that rule, they may say that they are following the original meaning of the Second Amendment. But the authority instructing them as to the content of that original meaning will be the Supreme Court's decision in *Heller*. *Heller's* function will be to take a multivocal morass of historical sources and trim it down to particular legal propositions that can be used to decide cases. That kind of clarification and rule-creation is a central virtue of judicial precedent. Without the benefit of that precedent—that is, if judges were perpetually to engage the question of the original meaning of the Second Amendment afresh, rather than adopting the meaning chosen earlier by other judges—we would remain without a stable rule. Thus, originalism here is a source of instability and not of discretion-confining rules.

V. ORIGINALISM AND TRADITION

Finally, consider the tension between Justice Markman's assertion that he is an originalist and his description of his approach to judging as "traditional."⁴¹ Like originalism, tradition and traditionalism locate authority in the past. But they do so in different ways and for different reasons. As Thomas Merrill puts the point, tradition is Burkean, but originalism is Borkian—and each is one of the other's greatest enemies.⁴²

Originalism locates legal authority in some set of facts that existed at a specific prior time when a law came into being. Tradition, in contrast, looks to the whole continuum of time leading up to the present. If the President of the United States has given a State of the Union Address every January for the

40. I do not mean to say that after *Heller* all Second Amendment issues are clearly settled. As everyone recognizes, *Heller* leaves many questions about the scope of Second Amendment rights to be worked out in future cases. I mean to say only that the threshold issue of whether the Second Amendment guarantees an individual right in the first place is settled by the holding of *Heller*.

41. Markman, *supra* note 1, at 151.

42. See Merrill, *supra* note 30, at 514–15.

last seventy years,⁴³ then an annual January address is traditional even if the ratifiers of the Constitution in the 1780s did not imagine that Presidents would comply with Article II, Section 3 of the Constitution⁴⁴ in that way. If Article II, Section 3 was originally understood to require something else—say, if reasonable people would have known that “from time to time” meant that the President should not address Congress on any regular schedule—then a decision today about whether an annual message complied with Article II, Section 3, would feature a conflict between originalism and tradition.

Such conflicts are not just hypothetical. In the recent case of *Department of Revenue v. Davis*,⁴⁵ the United States Supreme Court held that the Dormant Commerce Clause does not bar states from exempting income earned on their own municipal bonds from state income taxation. Writing for the Court, Justice Souter noted that all or nearly all of the states engage in the challenged practice and that they have all done so for generations. That is a traditionalist argument: here’s what we do around here, and what we’ve done around here for quite some time, and that fact about our longstanding practices is entitled to legal weight. In dissent, Justice Kennedy had little regard for these facts about practice. He instead offered a version of the original purposes of the Commerce Clause, rooted in the specific history of the 1780s.⁴⁶ On Justice Kennedy’s view, that slice of history is the important one. That is an originalist approach.

Traditionalism is about doing today what was done yesterday and the day before that. Originalism, in stark contrast, is about going back to time zero, whenever time zero was, and throwing out the deviations that have accumulated between then and now. Going back to time zero is not tradition. It can have any of several names, depending on whether the speaker wishes to signal approval or disapproval of the project. We could call it restoration, or reaction, or archaeology, or fundamentalism. Sometimes, it can make sense to sweep away a set of accumulated practices in favor of how things were, or were

43. He has not, quite. The facts here are stylized for purposes of the illustration.

44. U.S. CONST. art. II, § 3 (“He shall from time to time give to the Congress Information of the State of the Union . . .”).

45. 128 S. Ct. 1801, 1806–09, 1811 (2008).

46. *See id.* at 1823 (Kennedy, J., dissenting).

imagined to be, at a moment of origin. But doing so is not traditionalism. It is one of traditionalism's opposites.

Originalism also has an uneasy relationship with traditionalism as a matter of jurisprudential method. A method of judging is traditional if it calls on judges to decide cases in the ways that were dominant among their predecessors. On that understanding, originalism is less traditional than some of its chief rivals. In America, the most traditional form of jurisprudence—the form that has dominated among judges through the generations, and the form that each new generation of entrants into the legal profession learns as it is inducted into the culture of the guild—is not originalism but rather common-law judging. The leading spokesperson for this point is Justice Scalia, who regards common-law judging as the foil for originalism.⁴⁷ Originalism, Scalia explains, requires that judges overcome our common-law traditions, by which the judge is partly a policymaker and not just the agent of the legislature. That overcoming is a departure from tradition, perhaps even a revolutionary one. Originalism may or may not be a better theory of judging than the one the common law provides, but it is not more traditional.

This is not to say that originalist judging is foreign to our traditions. American judges have long included considerations of original meaning among various other kinds of jurisprudential methods when deciding cases, especially when the cases arise under constitutional or statutory authority. Considering original meanings as one of several sources of law is accordingly a traditional practice in constitutional and statutory cases. But traditional jurisprudence in such cases does not rely on original meaning, or on text, to the exclusion of other sources of law. Even in constitutional and statutory cases, judges have also long engaged in many other forms of reasoning, including some to which Justice Markman seems quite opposed. Making arguments about James Madison is indeed a traditional element of American constitutional law, but so is making arguments about justice.

47. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 7 (Amy Gutmann ed., 1997).

CONCLUSION

Once upon a time, in the 1970s—during the brief moment when the term “interpretivism” was in vogue—leading originalists like Robert Bork⁴⁸ and Raoul Berger⁴⁹ believed that originalism was the best way of showing proper respect for constitutional text, keeping to our traditions, constraining judicial discretion with rules, and forcing judges to decide cases based on the law as it is, not as they wished it would be. On reflection, those propositions are dubious. So it is worth asking why many intelligent lawyers might have subscribed to them, and indeed subscribed to them fervently.

There are many possible answers, each of them partial. One such answer is the appeal of certainty. Many people would find it reassuring for each constitutional question to have one clearly correct answer that follows cleanly from the text and accords with the understandings of the Founders. In a society that values democratic decisionmaking, it might also be nice if all matters of judgment could be settled by legislatures or constitutional conventions rather than sometimes being decided by judges. All in all, it is therefore appealing to imagine that there exists a sound method of constitutional interpretation that can simply follow the text, respect original meanings, and prevent judges from making decisions of policy or value. No such method exists. But wishful thinking is powerful, and even sophisticated thinkers often overlook problems with theories that seem to render the world as they wish it to be. Accordingly, many people are willing to believe that nontextual principles of constitutional law are actually present in the text, or that originalism fosters a jurisprudence of stable rules, even though those ideas cannot stand up to careful analysis.

Those kinds of wishful thinking distort constitutional discourse in every modern generation. But there are also other factors that are particular to specific moments in history, including the moment that gave us “interpretivism.” Consider, then, this oversimplified but nonetheless instructive account of the emotional-historical context from which 1970s theorists like

48. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 4 (1971).

49. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 328–29, 403–05 (Liberty Fund 2d ed. 1997) (1977).

Bork and Berger emerged. In the 1950s and 1960s, many people were disgusted by Supreme Court decisions like *Brown v. Board of Education*,⁵⁰ *Reynolds v. Sims*,⁵¹ and *Gideon v. Wainwright*.⁵² The opponents of these decisions hated what the Court had done, and they charged the Court with many different sins all at once. According to the critics, the Justices of the Supreme Court had ignored the text of the Constitution, abandoned American traditions, betrayed the Founders, and behaved lawlessly by making things up according to their own subjective preferences. Some of the critics—Judge Bork, for example—articulated their responses before *Roe v. Wade*,⁵³ and *Roe* only infuriated them further. By 1975, when Berger published *Government by Judiciary*, the critics had lots of complaints about the jurisprudence of the Supreme Court. But many of the critics lacked emotional distance from their subject matter. They were angry, and anger is not good for reflection, precision, and self-critical thinking. So rather than producing a reasonable alternative to the jurisprudence they opposed, some 1970s originalists imagined that they had one simple answer that would solve everything.

Constitutional law is not that easy. Originalist decisionmaking has strengths and weaknesses, and so does textualist decisionmaking, and so does traditionalism, and their strengths and weaknesses are not all the same.⁵⁴ Often, therefore, judges must choose among them, and among other valid forms of legal reasoning, rather than being able to honor them all at the same time. And when serious judges disagree, it is rarely the case that one side is following the rules and the other side is making things up. Instead, hard cases in constitutional law generally involve more than one way to understand what the sources of the law say, as well as disagreements about what the sources of the law actually are. Attempts to cast one side of such debates as simply ignoring the rules while the other side simply follows them are likely to misrepresent both the practice of judging and the nature of law.

50. 347 U.S. 483 (1954).

51. 377 U.S. 533 (1964).

52. 372 U.S. 335 (1963).

53. 410 U.S. 113 (1973).

54. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).